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Labor Arbitration Decision, Caravan Facilities Mgmt., LLC, 2022 BL 176704, 2022 BNA LA 98

SUMMARY

[1] Discharge - Gross disregard for safety rules - Equality of treatment ►118.659 ►118.651 ►118.67 [Show Topic Path]

Arbitrator Lee Hornberger held that Caravan Facilities Management, a contractor for GM, properly discharged the grievant for the major offense of gross disregard of safety rules when his violation of basic safety principles facilitated the fall of a two-ton guardrail crushing an electrician when an employee in a fork truck accidentally struck the unsecured rail. He found that the grievant, at the request of a co-worker and in violation of his safety training, removed the chains from a two-ton guardrail without making sure it was secured, failed to check with his manager or ask about a pre-task safety plan, and then left the area to perform his assigned task. The employer applied its safety rules without discrimination as the fork truck driver and the entire on-site management team were all discharged, and notwithstanding shared failure to properly plan the job, the penalty of discharge was reasonably related to the seriousness of his proven offense.

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LABOR ARBITRATION PROCEEDING

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of:

CARAVAN FACILITIES MANAGEMENT, LLC,

Employer,

and

UAW LOCAL 977,

Union

FMCS No. 210924-10342

Arbitrator Lee Hornberger

DECISION AND AWARD

April 18, 2022

APPEARANCES

For the Employer.

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For the Union.

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INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between Caravan Facilities Management, LLC (Employer) and UAW Local 977 (Union). The Union contends that the Employer violated the CBA when it discharged Grievant. The Employer maintains that it did not violate the CBA when it discharged Grievant.

Pursuant to the procedures of the Federal Mediation and Conciliation Service, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on February 23 and 24, 2022, in Marion, Indiana, via Zoom. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for the introduction of relevant exhibits. The dispute was deemed submitted on April 8, 2022, the date the post-hearing submissions were received.

The parties stipulated that the grievance and arbitration were timely and properly before me and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

Both advocates did an excellent job in representing their clients.

ISSUES

Was Grievant discharged for just cause, and if not, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 5: MANAGEMENT RIGHTS

"Section 1 — Retained Rights

> The Company, in the exercise of the customary functions of management, may establish, amend, and enforce reasonable rules not inconsistent with the terms of this agreement. … [T]he right to manage the Company's business, hire, promote, demote, discharge for just cause, lay-off, to direct the workforce or discipline for just cause, to establish standards of quality and operating standards, change methods of equipment to maintain efficiency of employees, and establish schedules is recognized by both the Union and the Company as the proper responsibility of management, whether the same has been exercised heretofore or not. …

Section 4 - Employee Responsibilities

All employees have the following responsibilities:

- Meet reasonable goals and schedules
- Work within reasonable Company guidelines
- Respect the individual rights of others
- Abide by reasonable standards of conduct and attendance policies
- Promote continuous improvement by looking for opportunities to make the Company more efficient
- Achieve quality goals and improve quality standards
- Follow the Health & Safety practices and procedures. …

ARTICLE 6 - SENIORITY

Section 6 - Termination

Seniority will be broken when:

- An employee is discharged for just cause. …

DISCIPLINE/DISCHARGE PROGRAM

Section 6 In cases of severe misconduct, employees may be discharged without prior notice. Examples of severe misconduct**[*2]** are listed in the shop**[*2]** rules section starting on page fifty (50).

SHOP RULES

There are two (2) categories of severity; #1 Major (up to and including discharge) and #2 Minor (subject to steps of the discipline procedure).

5. #1 Gross Disregard for safety rules.

FACTUAL OUTLINE

Background

The Employer provides custodial, facilities management, maintenance, and fleet repair services to its customers. It has an agreement to provide such services to GM. Until the Employer was removed from the GM Marion facility effective March 31, 2021, the Employer employed custodians and skilled tradesmen to perform housekeeping, industrial cleaning, and facilities maintenance. The Employer continues to provide services at other GM facilities.

GM employs approximately 700 employees at the Marion facility. The Employer employed another approximately 50 employees. Both GM and the Employer employees are members of UAW Local 977.

Grievant has a journeyman's card in heating, ventilation, and cooling (HVAC) and worked as a skilled tradesman for the Employer from June 6, 2016, to January 8, 2021.

December 29, 2020

In late 2020, the Employer proposed expanding the truck repair area to accommodate more workspace for the work done on internal plant vehicles. The truck repair area was an area where plant vehicles were repaired. The Employer proposed making it larger and brought a proposal to the GM safety committee concerning the expansion. In connection with the expansion, the Employer proposed moving a guardrail to a different position in the area. This would expand the floorspace where the work was performed. UAW representative to the safety committee Anthony Maynard and his GM counterpart rejected the proposal because the proposed relocation of the guardrail was to an area where it could not be properly secured at the top of the rail.

The Employer did not bring the proposal back to the safety committee. Instead, during the plant shutdown, the Employer's Director of Operations Rob Ogden instructed supervisor Mike Adams to have the guardrail moved to expand the area. On the morning of December 29, 2020, Adams instructed Tim Bookout and JR to perform the work.

Prior to any non-standard task (a task that is not a regular part of the job duties of an employee), GM and the Employer required a pre-task plan to be developed. The pre-task plan is a step-by-step analysis of the job and is developed with the input of every employee responsible for each step of the performance of the non-standard task. The purpose of a pre-task plan is to ensure that hazards associated with non-standard tasks are identified and that proper steps are taken prior to and during the job to mitigate these hazards. The movement of a guardrail this large should have involved a pre-task plan.

On the morning of December 29, 2020, after Adams provided the information about the guardrail moving project, millwright Bookout and ironworker JR were instructed to perform the job. Bookout was regularly**[*3]** tasked with moving guardrails in the plant and rigging**[*3]** and moving large pieces of equipment was within Bookout's specialty. JR was regularly asked to perform work that involved welding, which was within his trade specialty. JR was involved in this job because the guardrail needed to have the brackets that had been welded to its existing location on the pillars removed and JR also needed to use a torch to free the guardrail from the floor.

Bookout asked Adams for a blueprint and a pre-task plan. Adams told Bookout he would prepare a pre-task plan. After reviewing the job location, Bookout informed Adams that he did not need a blueprint

because the job was straightforward. Adams did not prepare the pre-task plan. The job involved moving the guardrail, which weighed approximately two tons, from one set of pillars to another set. Prior to moving the guardrail, the skilled tradesmen had to move the shelves that were placed next to the guardrail, remove the electrical conduits that ran power through the guardrail, detach the guardrail from the welded brackets that connected it to the pillars, and unbolt the guardrail from the floor.
The guardrail was secured with a clamp to the fork truck and driven to the location that Adams had instructed Bookout to place the wall. Between those pillars, the wall was placed on the floor and chained to the top of the pillars. That is where the wall remained after the end of the December 29, 2020, workday.

December 30, 2020, before the fall

On December 30, 2020, Adams was not at work. Employer supervisor Harley Hiner was in charge of assigning the work that day. When Bookout reported to work, he was assigned to go to safety training and was not available to work on the wall project. Hiner went to speak with Rob Ogden about the proper location for the wall. JR needed to clean out the pockets at the base of the wall so he asked Grievant to remove the chains so that JR could work on the pockets until Bookout's return and the report from Hiner. JR asked Grievant for help removing the chains because Grievant was operating the aerial lift that day to perform his own assigned task of fixing a leak on a heating duct.
Grievant did what JR asked him to do. Grievant, on his way to his own job assignment, removed the chains from the pillar. Within seconds, JR, while attempting to place the forks of the truck between the grids of the guardrail (in order to position the rail to be lifted) accidentally struck the rail and knocked it over. It fell and crushed electrician MM, who died shortly thereafter.

December 30, 2020, after the fall

The Employer immediately conducted an investigation, calling in its plant safety employee and HR employee to the facility. They took statements from Grievant, JR, and the other employees working in the area, as well as the supervisors and onsite management responsible for the project.

December 31, 2020

Grievant was suspended pending the outcome of the investigation on December**[*4]** 31, 2020, under Major Work Rule #5 "gross disregard for safety**[*4]** rules." The decision to suspend Grievant pending the outcome of the investigation was made by Employer Labor Relations Manager Teri Mayne. Mayne reviewed Grievant's personnel file and training record. She reviewed the entire investigation file.

January 5, 2021

Employer Environmental, Health, and Safety Manager Dan Skogen completed a final report on the accident on January 5, 2021. In the report, he stated that MM,

> was fatally injured in connection with work being performed when an 18 x 38 ft (5.5 x 11.5 m) partition wall made of tubular steel weighing approximately 4500 pounds (2,050 Kg) fell on him while he was working on attaching conduit to a guard rail. The wall was being prepared for final placement after having been moved the previous day by two mechanical trades employees. The plan by one of the trades employees was to remove chains that were temporarily holding the wall in place at its new location and then lift the wall with a fork truck while additional repairs were made. Upon removal of the chains, the other mechanical tradesperson attempted to position a fork truck to support the wall when he made contact at an elevated point of the structure causing it to fall forward and onto the electrician who was working in close proximity. *Id.*

Skogen prepared a "Root Cause Analysis" of the incident. This analysis said,

> Why: Why did the employee sustain fatal head and upper body injuries?
>
> Answer: An 18' x 38' partition wall fell on top of him.
>
> Why: Why did an 18' x 38' partition wall fall on top of him?
>
> Answer: Wall was bumped by a fork as the fork truck operator attempted to position the forks under one of the structure cross beams
>
> Why: Why did bumping the cross beam cause the structure to topple over?
>
> Answer: The chains temporarily securing the structure to building columns had been removed.
>
> Why: Why had the chains securing the structure to building columns been removed?
>
> ROOT CAUSE: There was no pre-task plan developed which would have identified the hazard associated with removing the chains. *Id.*

On the incident report, Skogen explained the contributing factors as,

> People: Injured employee was unaware of the potential hazard associated with his proximity to the other work being performed.
>
> Methods: Chains securing the wall in the upright position were removed to allow the structure to be lifted with a fork truck.
>
> Equipment: Fork truck was used to secure and move the structure as opposed to potentially more suitable equipment.

> Policies/Procedures: There was no planning developed and reviewed which would have coordinated activities and identified appropriate hazards and controls. *Id.*

January 8, 2021

On January 8, 2021, Mayne scheduled a virtual meeting and invited Union rep Aimee Pena, General Manager GM facilities Lori Steiner, and Employer Acting Site Manager GM Marion Daniel Tingley, The meeting was adjourned at the request of the**[*5]** Union so Pena could speak to Grievant and JR. When the meeting resumed, Grievant participated by phone.**[*5]** Mayne read the discharge notice to Grievant and gave him an opportunity to make a statement. Grievant declined.
The Employer's Director of Operations at the Marion GM Facility Rob Ogden, maintenance department supervisors Hiner and Adams, fleet supervisor in charge of the truck repair area Jenni Swafford, JR and Grievant were discharged. GM terminated its contract with the Employer and replaced the Employer with a different facility manager.
Grievant was terminated for what the Employer alleged was a major rule violation: Gross Disregard for Safety Rules. The termination decision was made by Mayne. Mayne believed termination was appropriate because Grievant did not follow basic safety principles. Mayne's decision was based on Major Work Rule #5. CBA, p. 48. According to the discharge notice,

> On December 30, 2020 at approximately 7:00 a.m., [Grievant] was directly involved in an incident causing a fatal injury to a team member. Following the investigation into the incident it has been determined [Grievant's] actions were in direct violation of established safety protocol and directly contributed to the accident.

According to Mayne, Grievant violated several safety rules, protocols and procedures. Grievant:

- removed the chains from a two ton guard rail without making sure it was secured or stable;
- took instruction from a co-employee not from his manager, who had already assigned him to fix dock heaters;
- did not survey the area or at least "take 2" as Skogen indicated was the minimum requirement;
- did not know if there was PTP;
- did not sign off on a PTP in violation of his training;
- failed to use common safety sense; and
- left the unsecured, unstable guard rail unattended when he left the area.

According to Mayne, Grievant's actions directly caused a fatality. She testified that he should have been aware. Mayne did not find it inconsistent that the on-site management team had been terminated as well because, according to Mayne, safety is everyone's responsibility, including hourly employees.

January 11, 2021, written Grievance

The written grievance was filed on January 11, 2021.

February 23 and 24, 2022, Arbitration hearing

The arbitration hearing was held on February 23 and 24, 2022, in Marion, Indiana, via Zoom.

CONTENTIONS OF THE PARTIES

a. For the Employer

According to the Employer, this matter comes before me as a challenge to the Employer's decision to discharge Grievant on January 8, 2021, under the Group 1 — Major Offense of Gross Disregard of Safety Rules. This is a "major" rule under the CBA warranting immediate discharge. The event giving rise to Grievant's discharge occurred on December 30, 2020, at the GM Marion Metal Stamping plant in Marion, Indiana, the site of a horrific workplace fatality caused by Grievant's conduct in**[*6]** violation of multiple safety protocols, procedures, practices, rules and, of course, common safety sense.
Significantly, on that fateful morning, Grievant was asked by his co-employee,**[*6]** JR, to remove chains holding in place a two ton guard rail so he could lift it with a forklift and drill holes in the bottom of it. Instead of questioning why a fellow bargaining unit member was giving him work instructions rather than a supervisor, or asking for a "Pre-Task Plan," or surveying the area for hazards and mitigating measures, or calling his supervisor for instruction, or contacting the Employer's safety coordinator, or taking any other safety precautions, Grievant got into an aerial lift and removed the chains from the guard rail. He then inexplicably left the area and the two ton guard rail unstable and unsecured: a proverbial "accident waiting to happen." JR was also discharged following the Employer's investigation of the accident. His case is presently going through the arbitration process.
Moments later, JR returned to the guard rail in a forklift truck, and as he attempted to maneuver the forks under a crossbeam on to the guard rail, bumped the unstable and unsecured guard rail, tipping it over and crushing co-employee MM to death. By this time, Grievant was approximately 100 feet away from the unchained and unsupervised guard rail.
Grievant's case must fail for several reasons. The Union's own witness, Tim Bookout, credibly testified to the proper and safe way this simple task should have been performed. According to Bookout, the guard rail should have remained chained from above until the forks were flush to and chained to the guard rail exactly as it had been secured by himself and JR the day before. Grievant admits that the job was done backwards and that the guard rail should have been secured to the forklift truck prior to the removal of the chains from above. All of the witnesses were consistent in this regard. Union witness, Anthony

Maynard, the UAW Health and Safety Representative, testified that he did not condone the way Grievant performed the task.
This is not a case where Grievant was made out to be a scapegoat. JR was also discharged. The Employer's on-site management team was discharged. The Employer was replaced at the GM Marion plant.
The Employer requests that the Grievance be denied and the decision to terminate Grievant be upheld.

b. For the Union

Grievant worked for the Employer as a skilled tradesman for nearly five years. On December 30, 2020, Grievant was assigned to a job repairing a leak on a heating unit. To perform that job, he was going to need to use the lift — a piece of motorized equipment that would raise him to the level needed to do the work. At the meeting that was held prior to every shift Grievant's**[*7]** co-employee, experienced skills trades ironworker JR asked Grievant to assist JR with the job JR was performing that day.
JR needed an assist with a job that he had been assigned the day before: the completion of the move of a guardrail that would expand the truck repair area**[*7]** in the plant for which the Employer served as the facilities manager — the Marion GM Stamping Plant. JR and Grievant both worked for the Employer, and JR, an ironworker by trade, had been tasked with the move along with millwright Tim Bookout, another Employer skilled tradesman. JR and Bookout had de-attached the guardrail from its previous location the day before, on December 29, 2020. They had chained the guardrail to the raised forks of a fork-truck and moved it to its new location and then chained the guardrail to the pillars at the new location. The guardrail was approximately 20 feet tall and 40 feet wide and weighed approximately two tons. Instead of being a solid wall, it was made up of steel-tubed gridwork and was bolted to the floor and welded to the pillars. Prior to being permanently relocated, the pockets where the bolts would be placed to attach it to the floor needed to be cleaned out and repaired before the guardrail could be re-bolted in its new location.
On December 30, 2020, JR intended to clean out the pockets so that the wall could be bolted to the floor. JR needed to lift the wall off the floor in order to be able to use a welding torch to clean out the pockets. To lift the wall off the floor, JR needed to detach the chains that connected the wall from the two pillars to which it was currently secured. To detach the chains, JR needed to use the lift in order to access the chains at the height where they were secured. Because Grievant had the lift, JR asked him to detach the chains on Grievant's way to perform the job to which he was assigned that day.
Grievant took the lift to his assignment and on his way, he stopped at the guardrail that was chained to the pillars. Grievant detached the chains from the pillars so that JR could lift the guardrail. When Grievant detached the chains, the guardrail was resting on its base on the factory floor. As JR had requested, Grievant used the lift to perform his assigned job and after he was approximately 100 feet away from the guardrail, JR inadvertently struck the guardrail with the prongs of his fork truck and the guardrail fell. Unknown to Grievant, MM, another Employer skilled trades employee, an electrician, was in the area and was crushed by the wall and killed.
The Employer terminated Grievant nine days after the accident for a "Gross Disregard for Safety Rules" which is a "Major" rule violation. Grievant timely grieved his termination; the parties were unable to resolve the grievance; and the matter is properly before the Arbitrator.
The fact that GM terminated the Employer from the Marion facility is immaterial to the consideration of the remedy. Had Grievant not been terminated, he would have automatically been hired by the Employer's**[*8]** successor pursuant to the agreement with the UAW. Reinstatement of his seniority and

full back pay would**[*8]** put Grievant in the same position as if the unjust discipline had never been issued.
The Union requests that Grievant be reinstated, effective immediately, to a skilled trades position with the Employer, and receive full back pay, as well as any other lost benefits to be determined by the parties. The Union requests that I retain jurisdiction for 60 days in case the parties are not able to agree on the scope of this remedy.

DISCUSSION AND DECISION

Introduction

The CBA provides that an employee cannot be disciplined without just cause. It is well established in labor arbitration that where, as in the present case, an employer's right to discipline an employee is limited by the requirement that such action be for just cause, the employer has the burden of proving that the discipline was for just cause. "Just cause" is a term of art in CBAs. "Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he was disciplined. Other elements include a requirement that an employee know or could reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline; the existence of a reasonable relationship between an employee's misconduct and the punishment imposed; and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.
For the following reasons, I conclude that the Employer did not violate the CBA when it discharged Grievant.

Discipline

Grievant was discharged for an alleged "direct violation of established safety protocol and directly contributed to the accident." The Employer contends that Grievant violated established safety protocol. The Union contends that Grievant did not violate established safety protocol.
The CBA provides that:

ARTICLE 5: MANAGEMENT RIGHTS

Section 1 — Retained Rights

> The Company … may establish … and enforce reasonable rules not inconsistent with the terms of this agreement. In addition, the right to … discharge for just cause … or discipline for just cause … is recognized by both the Union and the Company as the proper responsibility of management … . …

Section 4 - Employee Responsibilities

All employees have the following responsibilities: …

- Work within reasonable Company guidelines …
- Abide by reasonable standards of conduct and attendance policies …
- Achieve quality goals and improve quality standards
- Follow the Health & Safety practices and procedures. …

DISCIPLINE/DISCHARGE PROGRAM

Section 6 In cases of severe misconduct, employees may be discharged without prior notice. Examples of severe misconduct are listed in the shop rules section starting on page fifty (50).

SHOP RULES

There are two (2) categories[*9] of severity; #1 Major (up to and including discharge) and #2 Minor (subject to steps of the discipline procedure).

5. #1**[*9]** Gross Disregard for safety rules. Emphasis in original.

The Employer's discharge decision was based on Major Work Rule #5.

According to the discharge notice,

> On December 30, 2020 at approximately 7:00 a.m., [Grievant] was directly involved in an incident causing a fatal injury to a team member. Following the investigation into the incident it has been determined [Grievant's] actions were in direct violation of established safety protocol and directly contributed to the accident.

Mayne explained that Grievant was in violation of multiple safety rules, protocols and procedures. Grievant:

- removed the chains from a two ton guard rail without making sure it was secured or stable;
- took instruction from a co-employee not from his manager, who had already assigned him to fix dock heaters;
- did not survey the area or at least "take 2" as Skogen indicated was the minimum requirement;

- did not know if there was PTP;
- did not sign off on a PTP;
- failed to use common safety sense; and
- left the unsecured, unstable guard rail unattended when he left the area.

Burden of proof

The Employer has the burden of proof in a discipline case. Elkouri & Elkouri, *How Arbitration Works* (8th ed.), pp. 15-26 to 15-32; Abrams, *Inside Arbitration* (2013), pp. 206-209.

Grievant knew of the safety rules

Grievant was hired by the Employer in June 2016 as a skilled tradesman. He held his journeyman license for eight or nine years with a universal HVAC specialty. He held a Factory Vehicle Operator's License, which enabled him to operate the Employer's aerial lift among other powered industrial vehicles. Grievant received safety training during his orientation as well as annual refresher training, which included the proper planning of jobs and the use of Pre-Task Plans. He attended the refresher safety training in 2019 and 2020. Grievant's training included a review of the Safety Contract Management power point. Grievant had been trained on proper pre-task planning.

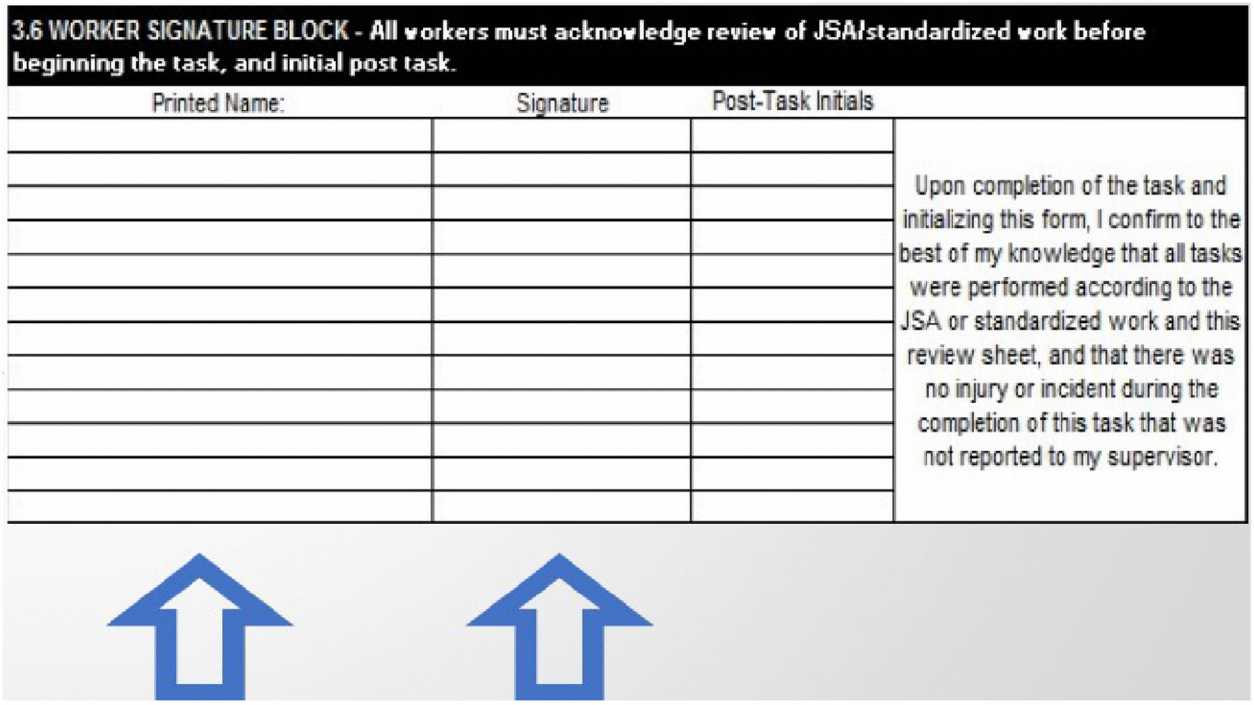
The Employer has a comprehensive safety program. This program utilizes five core processes: environmental health and safety (EHS) compliance, incident investigation and reporting, safe practices, task instruction sheets, and pre-task planning. Its safety program has been in place for about 10 years and adopts many of the safety principals used by GM. "Safety it's personal, own it" is on nearly every slide of the Employer's refresher training.

The Employer's safety is audited and evaluated on a regular basis. It is evaluated in EHS Compliance Evaluations on an annual basis. The Employer received a 97% score in 2019.

According to former safety coordinator Sheppard, the individual who conducted Grievant's safety training, was on the plant floor in Marion almost every day looking for safety related issues to address and to make sure safety protocols were followed. She conducted regular safety audits for the Employer. Shepard told the employees that they should not**[*10]** do an unfamiliar job if there is no pre-task plan (PTP) or if they had any questions. She provided employees her cell phone number and instructed employees to call**[*10]** her with any questions. Shepard testified that she would stop a job if there was no pre-task planning.

The Employer is audited by its customer annually. At Marion, this audit occurred 9 days before the incident at issue. The Employer received a score of 100% by the GM Facilities Manager. There are categories in the GM audit assessing the Employer's worker engagement, pre-task planning, and risk mitigation, among others and perfect scores were received.

With respect to pre-task planning, PTP is the joint responsibility of management and employees. Employees are required to sign off on the PTP before the task and initial it after the task.



3.6 WORKER SIGNATURE BLOCK - All workers must acknowledge review of JSA/standardized work before beginning the task, and initial post task.

Printed Name:	Signature	Post-Task Initials	
			Upon completion of the task and initializing this form, I confirm to the best of my knowledge that all tasks were performed according to the JSA or standardized work and this review sheet, and that there was no injury or incident during the completion of this task that was not reported to my supervisor.

Grievant knew from his training that pre-task planning was for safety and the identification of hazards. Input from the skilled tradesmen was important to planning because they were the "subject matter" experts, not the managers.

Grievant was aware of the Employer's safety policy. *First Transit*, **128 LA 586** (Goldberg, 2010) (denying grievance when the grievant received adequate notice of the rule). The Employer gave Grievant forewarning or foreknowledge of the possible disciplinary consequences of Grievant's conduct. Grievant knew or could reasonably be expected to know that he created a serious dangerous work condition by removing the security for the two ton guard rail and then leaving rail unattended and unstable.

The policy was a reasonable work rule

Management has the right to establish reasonable work place rules not inconsistent with the CBA. Elkouri & Elkouri, pp. 13-144 to 13-145. Assuming there is a proven violation and the other requirements of just cause, the Employer's safety policy is reasonable. Abrams, p. 261. The Employer's rule was reasonably related to the orderly, efficient, and safe operation of the Employer's business.

There was a fair and objective investigation

There was an appropriate investigation.

"Industrial due process … requires management to conduct a reasonable inquiry or investigation before assessing punishment." Elkouri & Elkouri, p. 15-49. It is a fundamental principle of employment law that

the issue of due process and following correct procedures can impact on the issue of just cause and the amount of discipline, if any, that should be approved or imposed. *Id.* at 15-47 to 15-50. *Federated Dep't Stores v. Food & Commercial Workers Local 1442*, **901 F.2d 1494** (9th Cir. 1990) (arbitrator appropriately determined due process to be component of good cause for discharge); *Teamsters Local 878 v. Coca-Cola Bottling Co.*, **613 F.2d 716, 718** (8th Cir.), cert. denied, **446 U.S. 988** (1980) (appropriate for arbitrator to interpret just cause as including requirement of procedural fairness).
Abrams, p. 211, states:

> … [T]he concept of "due process" is inherent in the just cause provision.
>
> … [a]arbitrators prefer seeing evidence that management … offered the accused employee the opportunity to contribute before the investigation hardened into a decision. A discharge followed by an investigation**[*11]** obviously puts the cart before the horse. An employer need not keep an employee at work, but there is no obvious reason why it cannot suspend the employee pending investigation.

Arbitrators "often overturn otherwise valid**[*11]** discharges where the employer has denied the employee those [due process] protections." Nolan, *Labor and Employment Arbitration* (1999), pp. 205 to 206.
Arbitrator Goldstein indicated at *State of Illinois*, **136 LA 122, 129-130** (2015), that:

> [A]n employer's obligation to a predisciplinary investigation is determined by context. … [T]he level of discipline involved is an important consideration … in determining whether the underlying investigation by the employer was fair and reasonable.

The Employer commenced an investigation of the incident almost immediately. Sandra Shepard, who was contacted just after the incident occurred, arrived at the Marion plant and went to the Union office where the involved employees were. She met with Union Chair Aimee Pena, and gave blank witness statements to the employees so they could write their statements. Shortly thereafter, Human Resources Generalist for the Employer Chandra Hawkins arrived and took over the investigation. She reviewed the employee statements and asked follow-up questions. She confirmed with Grievant that he was asked by JR to remove the chains, that Grievant did not question the instructions and that, after removing the chains, he left to get to his assigned job and was approximately 100 feet away when the guard rail fell. Hawkins typed her notes the following day and provided them to her boss, Bridget Foco.
Skogen completed a preliminary incident report on the day of the incident and a final incident report on January 5, 2021. Skogen concluded that the contributing factors included, "Injured employee was unaware of the potential hazard…", "Chains securing the wall in the upright position were removed…" and that "there was no planning developed and reviewed which would have coordinated activities and identified appropriate hazards and controls." According to Skogen's root cause analysis,

Why:	Why did bumping the cross beam cause the structure to topple over?
Answer:	The chains temporarily securing the structure to building columns had been removed.

Id. Skogen went on to note,

***continued* - Upon removal of the chains, the other mechanical tradesperson attempted to position a fork truck to support the wall when he made contact at an elevated point of the structure causing it to fall forward and onto the electrician who was working in close proximity.**

Id.

Grievant was given a meaningful opportunity to tell his side of the story before discipline was imposed. There was an adequate check against the possibility of an incorrect decision. The Employer, before administering discipline to Grievant, made an effort to discover whether Grievant violated or disobeyed a rule or order of the Employer. The Employer's investigation was conducted fairly and objectively. During the investigation, the Employer obtained substantial evidence or proof that Grievant was guilty as charged.

The rule was applied evenly and without discrimination

The Employer applied its safety rules even-handedly and without discrimination to Grievant.

There is a preponderance of proof that there was a violation

Neither Employer nor Union witnesses should be given higher deference. "[S]upervisors should not necessarily be given greater credibility … . [It has been suggested that] neither the discharged**[*12]** employee, the steward, nor the supervisor who made the [discipline] decision [is] inherently more credible … ." Elkouri & Elkouri, p. 8-97.
I have considered all the circumstances of all the witnesses when assessing testimony. I have considered**[*12]** the totality of the circumstances. Abrams, pp. 189-192; Elkouri & Elkouri, pp. 8-93 to 8-98.
Furthermore:

> The arbitrator's decision in discharge and discipline cases must reflect the parties' values and interests, not the arbitrator's personal conception of how the workplace should be run." Abrams, p. 202.

Penalty

It has been indicated that the remedy to be fashioned will be fact-specific. An arbitrator can consider mitigating circumstances. Arbitrators may reduce the penalty if, given the facts of the case, it is clearly

out of line with generally accepted industrial standards of discipline. Elkouri & Elkouri, pp. 18-46 to 18-49; and Elkouri & Elkouri, *How Arbitration Works* (8th ed.) (2018 Cum. Supp.), pp. 18-6 to 18-7. See generally *ConAgra Foods, Inc.*, **137 LA 169, 178-180** (Ross, 2017). "Absent a specific provision establishing that violation of a provision [of the CBA] results in [a certain level of discipline], the arbitrator has broad leeway to determine whether the discipline imposed fits the charge of misconduct." Farrell, "Due Process/Just Cause Issues," *References For Labor Arbitrators* (American Arbitration Association, 2005), p. 32.

Arbitrators have regularly upheld disciplinary decisions where bargaining unit employees create unsafe working conditions or disregard safe practices. *Timken Latrobe Steel Co.*, **115 LA 130, 135** (Harlan, 2000) (suspension sustained) (no death or injury); *The Kellogg Co.*, **138 LA 397, 407** (Ross, 2018)(employees are required to perform duties in a manner that does not endanger personal safety or the safety of others) (discharge sustained) (no death or injury); *Coreslab Structures*, **115 LA 997** (Gentile, 2001) (discharge sustained) (serious injury); and *Sunoco Mid-America*, *118 LA 1547* (Lalka, 2003) (discharge sustained) (no death or injury). Where an act is inherently dangerous or creates a dangerous condition, an employer does not have to prohibit employees specifically from engaging in the unsafe practice before taking disciplinary measures. *Snap-On Tools Corp.*, **104 LA 180** (Cipolla, 1995) (Employees do not have to be told that rolling under a railroad car on the track is unsafe. An employee may be disciplined for doing so without having been given prior warning.)

Arbitrator Harlan indicated in *Timken Latrobe Steel Co.*, **115 LA 130, 135** (Harlan, 2000), the fact that the work rules do not specify all of the safety rules does not excuse an experienced journeyman from using common sense. Some safety rules are a given, particularly for experienced skilled tradesmen. In upholding the discharge of the grievant for engaging in a single unsafe act, Arbitrator Harlon noted:

> The WORK RULES do not specifically state that an employee is prohibited from throwing a hot metal rod weighing about five pounds toward another employee. By the same token, the RULES don't say you cannot murder a fellow employee at work. …
>
> Grievant is a veteran employee who must be familiar with the WORK RULES. Perhaps more importantly, ***Timken is not required to list every possible safety infraction which might arise. The Management Rights Clause and its residual rights vest in Timken the authority and[*13] responsibility to direct the workforce and to manage its facilities***. When an individual asks for employment he agrees to report for work as scheduled and on time. He agrees to perform duties as directed if qualified and if there is not an imminent**[*13]** danger to life or property. He agrees to comply with work and safety rules. He agrees to comply with the COLLECTIVE BARGAINING AGREEMENT and applicable Federal and State Laws. ***At the very least [Grievant] tacitly agrees to apply his experience and common sense to avoid injury to himself and to others***. ***Id.* at 135** . Emphasis supplied.

Coreslab Structures, **115 LA 997** (Gentile, 2001), held that the employer had just cause to discharge an experienced employee who caused a steel form, which was not properly secured, to fall on another employee after hook hanging from spreader bar grievant was using caught the top of form. Neither the injured employee nor the grievant made sure the chain, which was connected to the storage post and then to the form as a safety backup restraint, was indeed connected. This was a serious omission and

was the responsibility of the team, including grievant and the injured employee. According to Arbitrator Gentile,

> [T]he bottom-line is neither the Grievant nor Riley used proper methods to first check and secure the chain to the form. This constitutes a serious breach of the Rules, notwithstanding their general nature, and amounts to an unsafe act by the Grievant/Riley team. This unsafe act calls for the administration of discipline. ***Id.* at 999** .

Rock-Tenn Co., *110 LA 1109* (Bard, 1998) (suspension sustained) (injury) denied grievances filed by skilled millwrights when they disregarded common-sense safety practices, resulting in an injury to one of the two. The Arbitrator agreed with the Company that there was no excuse which justified the grievants' actions.
According to Arbitrator Bard,

> ***These are highly experienced and seasoned employees; they did not need to be told to avoid committing acts which are as self-evidently reckless*** as attempting to cut a sliver of metal off a sheet of steel from the back end of an ironworker, and while holding one end of the sheet. The laws of physics which these employees experience in the performance of their job as millwrights dictate that if a sheet of steel is violently subjected to thousands of pounds of pressure one inch from its end, the portion of the sheet on the other side of the point where the pressure is being exerted is going to be significantly affected, that no person holding the sheet could take the place of metal clamps which were designed to hold the sheet in place against the enormous force being exerted by the cutting blade, and that anybody holding the long end of the sheet when the blade came down would be doing so at his peril. *Id.* at 112. Emphasis supplied.

In *Sunoco Mid-America*, *118 LA 1547* (Lalka, 2003), Arbitrator Lalka upheld the termination of a 13 year journeyman operator when he failed to properly lockout an isobutene pump.

> [A]s a Journeyman Refinery Operator he was aware the Green Book was located in his department, and was also accessible on the computer. When in doubt, especially where**[*14]** hazardous product is involved, such as isobutene, in a procedure which affects the safety of fellow employees, failure to follow proper procedure cannot simply be written off as confusion when the step-by-step procedure**[*14]** to be followed is readily available. *Id.*

Middletown Tube Works, **120 LA 744** (Braverman, 2004) (no death or injury), sustained a discharge and rejected an union contention that the grievant was unaware of the appropriate safety procedures where they were part of his training and experience.
In the case before me, Grievant testified that he did the job backwards, which caused the guard rail to become unsafe and to fall over. "[G]ross disregard of safety rules" includes such an act.
Grievant was obligated to follow all health and safety practices and procedures. CBA, pp. 6-7. Inconsistent with his training, he failed to do that by taking instruction from a co-employee, failing to plan for the task, ask about a PTP or sign one and, also inconsistent with his training, failing to survey the

area. He created a dangerous work condition by removing the security for the two ton guard rail and then leaving it unattended and unstable.
"An arbitrator is mindful of the context of the employee's work. … Concern about safety is essential in the workplace for every employee and for the employer." Abrams, p. 220. "[A]rbitrators frequently give employers significant latitude in disciplining employees who … have jeopardized workplace safety." Elkouri & Elkouri, p. 16-3.
The Union argues that the failure to properly plan the job was the Employer's failure, not Grievant's failure. Grievant untied the chain. Grievant left the unsecured wall unattended and unchained. Grievant walked away from the unsecured wall and left it in an unsafe condition.
The Union argues that Grievant was terminated because the incident caused a fatality, not because of his own conduct. The CBA provides for discharge for gross violation of safety rules. This safety discharge prerogative is not an Employer unilaterally established obligation. Because it is embedded in the CBA, it is part of the just cause definition in the CBA. Previously cited in this Decision are awards that have sustained discharges for serious safety violations that did not result in death or serious injury.

The degree of discipline administered by the Employer was reasonably related to (a) the seriousness of Grievant's proven offense and (b) the record of Grievant's service with the Employer.

Conclusion

The crucial points in this case include:

1. This case involves safety (Elkouri & Elkouri, p. 16-3, and Abrams, p. 220);

2. The importance of safety is embedded in the CBA (CBA, pp. 6 and 48);

3. The safety rules are embedded in the CBA (p. 48);

4. The CBA and a stream of previously cited in this Decision arbitration awards support the first offense discharge of an employee for a serious safety violation even if there is not a fatality;

5. The totality of the circumstances; and

6. The CBA.

This decision neither addresses nor decides issues not raised**[*15]** by the parties.
Grievant was discharged for just cause

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I deny the Grievance.

LEE HORNBERGER

Arbitrator
Traverse City, Michigan**[*15]**

Dated: April 18, 2022

General Information

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